IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

No.33868

JEANNE CARTWRIGHT, as Guardian and parent of
TIFFANY CARTWRIGHT, a minor child,

Plaintiff Below, Appellant

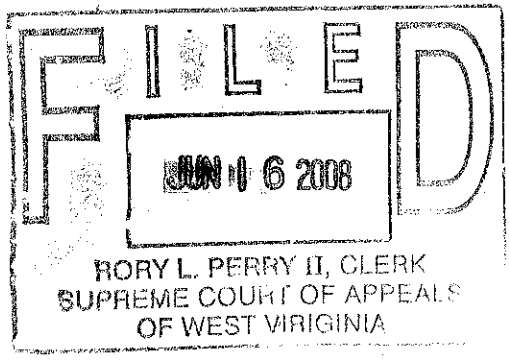
vs.

CABELL HUNTINGTON HOSPITAL, INC.

Defendant Below, Appellee

BRIEF OF APPELLEE, CABELL HUNTINGTON HOSPITAL, INC., IN RESPONSE TO THE BRIEF OF APPELLANT, JEANNE CARTWRIGHT

BAILES, CRAIG & YON, PLLC
SUITE 500, THE ST. JAMES
401 TENTH STREET
HUNTINGTON, WEST VIRGINIA 25701
(304) 697-4700



BAILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

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401 10TH ST., SUITE 500
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I. THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

On March 8, 2003, the West Virginia Legislature amended the Medical Professional Liability Act with several specific substantive changes, which became commonly known as the 2003 tort reform amendments (hereinafter referred to as "MPLA III".)

On April 23, 2003, Appellant Jeanne Cartwright, brought a civil action against Carl McComas, M.D. in the Circuit Court of Cabell County alleging medical malpractice. The care in question occurred in 1999, and was rendered to the Appellant's daughter, Tiffany, at Cabell Huntington Hospital in Huntington, West Virginia (hereinafter "CHH" or "the hospital"). Appellant, plaintiff in the proceeding below, alleged that Dr. McComas deviated from the standard of care by failing to order a Magnetic Resonance Imaging (MRI) study for Tiffany, thus delaying the diagnosis of an epidural mass in her spine. Appellant's claim below also included the allegation that such deviation resulted in serious injury to Tiffany.

On July 1, 2003, the MPLA III amendments became effective.

On June 15, 2005, two years after the lawsuit against the doctor was filed, and after the MPLA III was in effect, the Plaintiff below obtained the trial court's leave to file a complaint against CHH. This later emerging complaint asserted that CHH's employees and agents had committed direct acts of negligence in Tiffany's care, and that CHH was also liable under the doctrine of ostensible agency for Dr. McComas' alleged acts of negligence.

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

After twenty five (25) months of discovery, no claims of direct CHH negligence could be sustained. The hospital filed its Motion for Summary Judgment on both the direct negligence and ostensible agency claims, and a hearing on the Motion occurred at the Pretrial Conference, one week before the scheduled commencement of trial. In her Response to the hospital's Motion for Summary Judgment, Appellant plaintiff conceded that her direct negligence claims had not been substantiated by expert testimony. See Response to Cabell Huntington Hospital, Inc.'s Motion for Summary Judgment, p.1. However, Appellant continued to advocate hospital liability based on the ostensible agency claim alone. The trial judge granted CHH's Motion on both the direct and vicarious liability claims. CHH was dismissed with prejudice from the case. See Pretrial hearing transcript, the pertinent pages of which are attached hereto and made a part hereof as Exhibit A.

On the eve of trial, Appellant settled her case with co-defendant Dr. McComas for the same acts of alleged negligence which she now asserts in this Appeal as the basis for her ostensible agency claim against CHH. Since Appellant settled her direct liability case against Dr. McComas and received an adverse ruling to the Appellee defendant's summary judgment motion below, Appellant's claim herein has never been reduced to judgment.

In her Brief now before this Court, Appellant argues that the retroactive application of West Virginia Code §55-7B-9(g) by the trial court violates her due process rights and is, therefore, unconstitutional. Appellee files its Brief in opposition to her constitutional claim.

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ATTORNEYS at LAW
401 10TH ST., SUITE 500
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II. STATEMENT OF FACTS

On October 5, 1999, Tiffany Cartwright was transferred to Cabell Huntington Hospital by the Bellefonte Family Clinic in Ashland, Kentucky. She was referred by her family physician, Dr. Thomas Ryan, who suspected Guillain-Barre Syndrome ("GBS"). Dr. Ryan had called for a pediatric transport but none was available. Therefore, the child was brought to the hospital by her mother via family vehicle.

Her treatment history before coming to CHH included a complaint of arm pain followed by an office visit with an orthopedist who determined that her arm was not broken. Complaints of neck pain were followed by a visit to a chiropractor and an ER visit to Bellefonte, Kentucky wherein she was seen to be dragging her leg. By the time she reached her family doctor's office on October 5, 1999, she had progressive weakness and was unable to walk entirely. She was also incontinent of urine. Her mother reported that she had become progressively clumsy and had several behavioral changes.

Tiffany was admitted to the CHH emergency room where she was seen and attended to by Marshall University pediatric residents. Lab work was done to test her complete blood count. Her chemical profile and blood cultures were ordered, along with sedimentation rates and other isoenzyme studies to test muscle tissue. A CT scan of the head was done with and without contrast material and she was placed on bedrest with an IV infusion of D5 1/2 NS with 20 meq. of potassium chloride.

She was transferred to the Pediatric Intensive Care Unit under the care of Dr. Pino, a pediatric intensivist from Marshall University. After his examination of Tiffany, Dr. Pino ordered viral studies and did a lumbar puncture (spinal tap). The spinal fluid

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ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

obtained in the procedure was sent for laboratory analysis and revealed 3 white blood cells, no red blood cells, glucose of 61 and a protein level of 455 (14 to 45 being the normal range). Dr. Pino also ordered a neurological consult with either Dr. Barebo or Dr. McComas to "R/O Guillain Barre." CHH contests that Dr. McComas was, in fact, at all relevant times herein CHH's ostensible agent, however, CHH acknowledges that the issue of whether or not Dr. McComas was CHH's ostensible agent is a jury question and, as such, is immaterial to any issue on appeal herein.

At the time of the above-referenced consult, Tiffany had no deep tendon reflexes in her legs and a questionable response to deep pain in the thighs. She complained of pain in her right arm, which she reportedly injured when she fell at school some two weeks prior to this admission. Tiffany's neurological exam revealed neck flexor weakness, profound truncal weakness, flaccid paraplegia (paralysis of the legs) and the absence of knee and ankle jerks. An electromyography study ("EMG") was done and found to be consistent with the clinical diagnosis of Guillain Barre Syndrome. She was started on Sandoglobulin (IVIG) therapy and was maintained in the PICU for three days. On October 8, she reportedly moved her lower extremities briefly in response to painful stimuli. Physical therapy was started and she was moved to the regular pediatric unit.

By October 10, 1999, she had progressed to a point where she could withdraw her legs with minimal stimulation. She did not complain of pain for the first 10 days of her visit, but her mother reported that she had some neck pain which was relieved by plain Tylenol, two times during the early morning hours of October 15th, and at 4:00 a.m. on October 16th. She continued to improve gradually until her discharge on October 16th.

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ATTORNEYS at LAW
401 10TH ST., SUITE 500
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At the time of her discharge Tiffany's parents were instructed to continue with therapy, take her to see her family doctor in one week, and follow- up with Dr. McComas in three weeks.

Tiffany was next seen by Dr. McComas in his office on November 8, 1999. At that time she was found to have good tone and strength in her upper extremities with hypotonic paraplegia (diminished tone and weakness in both legs). She also had cross adductor responses at the knees (stimulus to one knee causes the other knee to pull in toward the body) and bilateral ankle clonus (stimulus of a reflex point will cause a repeated beating or thumping of the extremity). This clonus was not sustained, and did not continue for more than just a few beats. At the time of the visit, Dr. McComas changed his diagnosis from Guillain Barre to Myelitis (irritation of the covering of the spine). He ordered an MRI for cervical and thoracic spine films, but the test was rescheduled by the family due to a minor illness.

On December 17, 1999, the MRI was completed and revealed an elongated epidural mass or questionable lipoma. Dr. McComas referred Tiffany to David Weinsweig, M.D., a Neurosurgeon in Huntington. Dr. Weinsweig's notes indicate that he saw Tiffany on the 27th of December, at which time the parents indicated that they had scheduled an appointment in Columbus for the next day in order to get a second opinion.

On December 28, 1999 Tiffany was seen by Dr. Kosnik at Columbus Children's Hospital where a second MRI was done, and a laminectomy was performed at C- 6 through T- 3 to resect an epidural hemorrhagic mass. Extensive therapy followed this procedure.

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

Tiffany was discharged to her home on January 15, 2000. Her multiple limitations and paralysis requires wheelchair and bilateral quad cane usage.

III. DISCUSSION OF LAW

INTRODUCTION

Appellant's Brief asserts three assignments of error. The first of these is that the trial court erred in granting Appellee's Motion for Summary Judgment below because it failed to make a determination that Appellant's vicarious liability claim against CHH in a medical malpractice action is a protected property interest under the due process clause of the West Virginia Constitution. Appellee's response to the first alleged error is that Appellant is probably correct in labeling her claim as one which involves constitutionally protected property. However, Appellee further responds that, for due process analysis under West Virginia's decisional law, the presence of constitutionally protected propeprty is not enough to establish Appellant's further claim that the trial court's retroactive use of the amended statute herein is unconstitutional.

The second allegation of trial court error is that the decision to retroactively apply the 2003 amendment codified at §55-7B-9(g) of the West Virginia Code to Tiffany Cartwright in the proceeding below is unconstitutional because her ostensible agency claim is a vested property interest which is governed by due process of law. Appellee responds that the trial court's decision to use the ostensible agency amendment to bar her claim was not only substantively correct, but fully constitutional as well.

Appellant's third attempted assignment claims that the trial court erred by using a statutory interpretation of the above-identified amendment which the West Virginia

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401 10TH ST., SUITE 500
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Legislature did not intend. Appellant asserts that the Legislature never intended for its 2003 tort reform, and the amendment to the ostensible agency doctrine included therein, to bar Appellant's vicarious claim against the hospital under the facts and circumstances in this case. Appellee responds that the Legislature intended its amendment to achieve precisely that result.

A. A CAUSE OF ACTION IS PROBABLY A PROPERTY INTEREST WHICH IS PROTECTED BY CONSTITUTIONAL DUE PROCESS IN WEST VIRGINIA.

Appellant's constitutional argument begins with the proposition that her vicarious liability claim against the hospital is a protected property interest under the due process clause which is insulated from arbitrary legislative actions. Appellee concedes that Appellant is probably right on this point, and cites Gibson v. Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991) as legal authority for this statement.

Appellee's legal research on the issue of whether or not Appellant's vicarious claim merits the "constitutional label" has produced interesting results, as judicial approaches to this topic vary across jurisdictions. In tort actions, some courts characterize the property interest as constitutionally protected based on the timing of the accrual of the cause of action, while others direct their attention to whether or not such tort claims have been reduced to judgment before a retroactive application of the relevant statute occurred.

In Resolution Trust Corporation v. Fleischer, 862 F.Supp. 309 (D. Kansas, 1994), a United States District Court provides a summary of how some circuit courts in the federal system have dealt with the issue of labeling property as constitutionally protected:

> There are a number of federal cases that hold that an **accrued** tort action is not a vested **property right**. *See*

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

> *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990) (the fact that a statute is retroactive does not make it unconstitutional because a legal claim affords no definite or enforceable **property right** until reduced to final judgment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("legal claim affords no definite or enforceable **property right** until reduced to final judgment"; *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 988 (9th Cir. 1987) (a party's **property right** in any **cause of action** does not vest until a final unreviewable judgment is obtained); *Hammond v. United States*, 786 F.2d 8, 11 (1st Cir. 1986) ("because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2312 and retroactively abolishing her **cause of action** in tort". Each of these courts, applying the rational basis standard of due process review, upheld the **constitutionality** of statutes that retroactively abolished **accrued causes of action** in tort. Id. at p. 313.

In Gibson, the West Virginia Supreme Court considered the constitutionality of a statute of repose designed to protect architects and builders from increased exposure to liability as a result of the demise of the privity of contract defense. In considering the effect of the certain remedy provision on such statute, the Gibson court considered the meaning of the term "vested right." Gibson cites the United States Supreme Court case of Gibbs v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933) for the principle "that an accrued cause of action is a vested property right and is protected by the guarantee of due process." *See,* Gibson at pgs. 225, 451.

Accordingly, Appellee concludes that the Supreme Court, in the instant case, will deem Appellant's ostensible agency claim to be constitutionally protected property, despite the fact that such claim was not reduced to judgment before the trial court retroactively applied the 2003 statutory amendment. However, Appellant's use of Gibson

BAILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

as authority to achieve the "constitutional label" on their first assignment has ominous implications for Appellant when considering the alleged second assignment of error. Any time a court confronts the general issue of retroactive legislation, it usually begins by making a threshold determination of whether the statute in question affects a remedy or a substantive right.

> If the measure affects a remedy, the court typically reasons that no one can reasonably expect a remedy to remain immune from legislative controls, and, consequently, it will sustain the retroactive legislation." See, Resolution Trust at 313.

Gibson relies on the holding of Gibbs to make a vested claim constitutionally protected property. The holding in Gibbs expressly provides:

> The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 U.S. 124, 132, 1 S.Ct. 102, 27 L.Ed. 104), the appellant has no property in the constitutional sense, in any particular form of remedy, all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. See, Gibbs at 332.

B. THE RETROACTIVE APPLICATION OF WEST VIRGINIA CODE §55-7B-9(G) TO TIFFANY CARTWRIGHT IS NOT A VIOLATION OF CONSTITUTIONAL DUE PROCESS.

1. Appellant has no property, in the constitutional sense, in any particular form of remedy and §55-7B-9(g) is an amendment to the Medical Professional Liability Act which is purely remedial in nature.

The cause of action below arose in 1999, with the Complaint below being filed in April of 2003. At that time the MPLA II was in effect. The salient provisions of the

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

MPLA II provided for non-economic damages being capped at one million dollars ($1,000,000.00). At the same time the seminal ostensible agency case of Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 684 (1991) was used as legal authority to bring claims of vicarious liability against hospital providers for the actions of non-physician employees who either reasonably appeared to be, or were actually held out to the public as being, directly employed by a defendant hospital. After the tort reforms of the MPLA III became effective in the summer of 2003, the non-economic caps were reduced to two hundred fifty thousand dollars ($250,000.00) regardless of the number of plaintiffs and defendants involved in the case, and the ostensible agency theory for hospital liability was limited to those non-employee physicians who carried less than one million dollars ($1,000,000.00) of professional liability insurance.

These two statutory changes confront Appellant with a grim reality. The net effect of the West Virginia Legislature's amendments only reduce Appellant's remedy; they do not substantively destroy her basic rights. Appellee suggests that the ostensible agency amendment involves a situation wherein the Legislature merely asserted control of the remedies available to potential plaintiffs. The strict elimination of an accrued cause of action did not occur. Despite the decision of the trial court below to grant Appellee's Motion for Summary Judgment, the plaintiff below retained the right to pursue any vicarious claim extant against any ostensible agent whose professional liability coverage was less than one million dollars ($1,000,000.00). In effect, the Legislature's action regarding the ostensible agency amendment was a defacto cap on recovery.

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

The statutory amendment which plaintiff claims abolished her constitutional rights was, in fact, only remedial in nature. The retroactive application of such amendment by the trial court judge, therefore, cannot be characterized as unconstitutional.

2. §55-7B-9(g) is an amendment to the Medical Professional Liability Act which does not extinguish Appellant's claim against Appellee, but does limit the scope of recovery which can be obtained in the underlying action.

Appellant's Brief states a central theme regarding her alleged second assignment of error. It is this: the granting of the hospital's ostensible agency Summary Judgment Motion by the trial court below was only accomplished by the unconstitutional retroactive application of a statute and resulted in the complete extinction of the only meaningful claim she had against the hospital.

Appellee's first argument against the Petition's central theme is that Appellant has inaccurately characterized the status of her cause of action and vested property right. She claims that her right has been discarded by the trial judge's ruling on the Motion in question without due process of law. She asserts that through the lower court's decision, she has lost her underlying cause of action. Appellant surmises that her "right to a cause of action [against CHH] and a substantial part of her future welfare...were substantially extinguished by the fact that the Circuit Court of Cabell County failed to recognize a cause of action as a property right." Petition for Appeal of Jeanne Cartwright, p 8.

None of these allegations are true. Immediately following the trial court's award of the hospital's motion, she still had causes of action to assert which served to redress her grievance. Her suit against Dr. McComas for his direct acts of negligence was still in place. Had she been able to sustain with expert testimony her claims of direct negligence

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

against CHH's employees and agents, that action would also still have been in play. The MPLA III did not prevent her from prosecuting her direct liability claims against the hospital. In fact, the case against the hospital was not extinguished by the ruling below. It simply burned out due to a lack of evidence that any one under the hospital's control injured Tiffany Cartwright. Certainly if she had facts to support it, she could have also brought and carried forward any other claim of ostensible agency against any other ostensible agent of CHH who did not have one million dollars ($1,000,000.00) of insurance coverage at the time of the event in question. In effect, therefore, the ruling of the trial court in granting CHH's Motion did not extinguish Appellant's cause of action against the hospital as she alleges: it merely limited, at the margins, Appellant's ability to seek redress for the claim of ostensible agency.

Nevertheless, she claims the loss of this one claim is a denial of due process. It is the position of Appellee that whether or not she lost just one of her claims or her entire arsenal of hospital claims, the granting of the CHH Motion was not and, had all claims been effected by the ruling, would not have been, an unconstitutional act. It was never necessary that the trial court determine whether or not a cause of action is a property interest or whether or not the loss of part of that cause of action or all of that cause of action mitigated against the application of W. Va. Code §55-7B-9(g). The retroactive use of the MPLA III's ostensible agency amendment in the action below was not a denial of due process because that statute, as amended, always had a rational basis for purposes of constitutional analysis. The real question, for purposes of due process analysis, is whether the Legislature, by applying the MPLA III to all cases filed after July 1, 2003, regardless

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

of the date of accrual of the causes of action, effectively extinguished her cause of action against the hospital.

The retroactive application of the MPLA III to Appellant's ostensible agency claim did not deprive her of a property right or fully extinguish her hospital claim. It was the facts of her underlying hospital claim which produced that result. Plaintiff availed herself of more than two years of discovery in the underlying case against CHH. Multiple interrogatories and requests for documents were served upon CHH and answered. Plaintiff below offered five expert witnesses with expertise in medical-legal issues, none of which produced any testimony that the employees of CHH deviated in the standard of care or caused harm to Tiffany Cartwright. At the conclusion of a protracted discovery period, Plaintiff below had not produced one shred of evidence to prove negligence on behalf of any CHH employee.

Appellant also brought an action and settled with the physician whom she claims is the actual tortfeasor in this case. She now asks the Court to rekindle a cause of action permitting her to sue the hospital, not for the actions of any of the hospital's 1800 or more employees, but for the alleged negligence of a doctor over whom the hospital has no control. Appellant's right to proceed against the hospital for the actions of the doctor were not extinguished by the Legislature's statutory amendments, but by Appellant's own delay in filing the case against CHH for six years after the alleged accrual of a cause of action.

The proposed statutory changes which are the crux of Appellant's hospital case were well publicized prior to enactment of the MPLA III. Had she filed her claim against CHH under the MPLA I or II, which she easily could have accomplished, Plaintiff would

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

have enjoyed the statutory right to hold the hospital responsible for the actions of Dr. McComas. She did not do so and now cries foul for her own folly.

3. If the Legislature has expressed its clear intention, a substantive statute may be applied retroactively in West Virginia.

In her second assignment of error, Appellant claims that, as applied to her circumstance, the retroactive application of West Virginia Code §55-7B-9(g) of the MPLA III took away her property right without due process of law. In support of the argument that the singular ostensible agency claim against CHH was taken away with out due process of law, Appellant cites a number of West Virginia and United States Supreme Court cases. None of these cases stand for the proposition that the Legislature unconstitutionally deprived her of her ostensible agency claim, or that this claim is even a property right. In fact, several of the cases, particularly Mildred L.M. v. John O.F., 193 W.Va. 345, 452 S.E.2d 436 (1994) and Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483,(1994) stand for the proposition that a statute which is substantive in nature may be applied retroactively, so long as the Legislature has made clear its intention for the statute to be so applied. Mildred at 352,443, n.10, (citing Landgraf at 264,1496).

Perhaps the case most on point cited by Appellant, but also quickly distinguished from the case at hand is Blankenship v. Richardson, 196 W.Va. 726, 474 S.E.2d 726 (1996). In Blankenship, Petitioner Ullom asserted that a particular act of the Legislature, Senate Bill 250, which changed the requirements of qualifying for permanent total disability, was unconstitutional on its face and as applied to his individual circumstance. In its analysis, the Court first considered the concept of equal protection, as embodied in the West Virginia Due Process Clause. Citing Gibson v. W.Va Department of Highways,

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

185 W.Va. 214, 218-219, 406 S.E.2d 440, 444-445 (1991). That clause states "[n]o person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers." West Virginia Constitution Art. III §10. Having found the statute constitutionally valid on its face under the equal protection analysis, the Court analyzed the application of the statute to Petitioner under a strict substantive due process analysis. The Court ultimately found that Petitioner Ullom's "substantive right to be considered for an award of PTD (Permanent Total Disability) benefits was precluded by the instantaneous enactment of Senate Bill 250." Blankenship, 196 W.Va. at 738. By "instantaneous", the Court was referring to the fact that the Legislature had voted to override the 90-day waiting period between passage of the act and the date of effect. See W.Va. Constitution Art. VI §30. In other words, the legislature changed the enactment rules and did not provide the requisite 90 days for the public to respond. It was this basis alone that the Court in Blankenship determined that the Legislature violated Petitioner Ullom's right to "fundamental fairness embodied in the due process provisions of W.Va. Const. Art III §10. Blankenship, 196 W.Va. at 739.

By contrast, the MPLA III passed the West Virginia Legislature on March 8, 2003 and was made effective immediately. However, unlike the eight day window to which the plaintiff in Blankenship was limited, Appellant had nearly three months to file her action and activate the ostensible agency provision prior to the repeal of MPLA II. The publicity surrounding the effective date of the MPLA III amendments was as notorious as any other statutory change in recent West Virginia history. Yet, Appellant did not take advantage of her favorable situation and waited to file her hospital claim well after July 1, 2003.

BAILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

Therefore, the factual circumstances of Blankenship render that case and its implications for substantive due process inapplicable to and distinguishable from the case at bar.

4. §55-7B-9(g) is an amendment to the Medical Professional Liability Act which has a rational basis.

As a threshold matter, the Court has summarized the concept of due process as "ultimately measured by the concept of fundamental fairness." State ex rel. Cogar v. Kidd, 160 W.Va. 371, 376, 234 S.E.2d 899, 903 (1977). When a party asserts that it has been deprived a right without due process of law the equal protection clause is implicated. See West Virginia Constitution Art III §10.

Even a vested property right must give way to legislation that is rationally based. Assuming that Appellant's cause of action is a vested property right, legislation can abolish that right if it is reasonably related to a legitimate government function. Equal protection analysis balances the rights of individuals against the state's interest. Each act of legislation is weighed against the effect it will have on a particular group of citizens. Suspect classes such as persons grouped by race, and fundamental rights such as speech, require strict scrutiny by the courts to assure fairness. Hence, legislation involving suspect classes or fundamental rights can not survive unless it is necessary to promote a compelling state interest. Deeds v. Lindsey, 179 W.Va. 674, 677 S.E.2d 602, 605 (1988). Intermediate level protections are accorded to classifications such as gender. This level of scrutiny requires that legislation serve an important governmental objective and must be substantially related to the achievement of that objective. Syl. pt. 5, Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989).

JLES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

Legislation involving economic rights, such as those at issue in this case, are subject to the lowest level of scrutiny. This category requires that the legislative classification need only be reasonably related to the achievement of a legitimate state purpose. In 1991, the Supreme Court in West Virginia reformulated the "rationale basis" analysis in Gibson v. Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991).

In Gibson, the Court was asked to determine the constitutionality of the West Virginia Statute of Repose, West Virginia Code, §55-2-6a. Like the instant case, the plaintiff in Gibson claimed that legislation was unconstitutional and violated due process and equal protection guarantees. The Court conducted a two-part inquiry, looking first to see if the plaintiff had been deprived of a vested right. Next the Court turned to an inquiry regarding whether the enactment severely limited existing procedural rights. This part of the inquiry determined that there was a rational basis for the law as written. Id. at 450.

The Court stated:

> [w]here economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic facts, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

Id. at Syl. pt. 4 (citing Syl. pt. 7, as modified, Atchinson v. Erwin, 172 W.Va. 8, 302 S.E.2d 78 (1983), and Syl. pt. 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W.Va. 538, 328 S.E.2d 144 (1984).

AILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

Regarding the statue at issue in the instant matter, §55-7B-1 of the West Virginia Code, through legislative findings and a clear declaration, demonstrates that the purpose of the revised MPLA III is to provide for a comprehensive resolution of the matters and facts which the Legislature finds must be addressed to accomplish the legitimate state goals of: (1) assuring the highest quality of care for west Virginia citizens; (2) retaining qualified physicians and health care providers; (3) maintaining qualified trauma services; (4) assuring the availability of reasonable insurance coverage for health care providers; and (5) adequate compensation for victims of malpractice.

There can be no doubt that the legislation at the center of this controversy is rationally based on social, economic and historic concerns and reasonably related to a proper governmental purpose: ensuring adequate and affordable health care in West Virginia. The case at bar directly relates to Appellant's economic rights and, therefore, the Court must accord considerable deference to the legislative enactment. Gibson at 443. The statute does not violate the equal protection principle of the due process clause of the West Virginia Constitution, even if applied retroactively.

A second example of the rationale basis standard is demonstrated when considering the issue of the accrual date specified in West Virginia Code §55-7B-9(g). Perhaps in the instant case the issue of the retroactive application of the statute in question could have been avoided had the Legislature deemed the day the cause of action arose, instead of the day the cause of action was filed, as the expiration date of MPLA II. A prospective statute would have certainly obviated the constitutional problems created by a

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
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retroactive statute. However, before pursuing this point, Appellee cites some recent and well-known history of medical malpractice in West Virginia.

The West Virginia Medical Malpractice Professional Liability Act (1986) (hereinafter referred to as "MPLA I") was originally adopted by the West Virginia Legislature in 1986. This statute arose against the backdrop of rising malpractice insurance costs for West Virginia physicians and other health care providers. The Legislature intended the MPLA I to curb those escalating costs by reducing the number of frivolous complaints filed in the circuit courts: regulating the liability insurance industry; creating a physicians mutual insurance company with its own compensation fund; and expanding the authority of medically related licensing boards to regulate and discipline providers. Unfortunately, the passage of the next 15 years did not produce the desired result of a reduction in the cost of insurance premiums for providers.

In 2001 the Legislature enacted both substantive and procedural changes to the MPLA I. These reforms became known as the MPLA II. Principal among the MPLA II reforms was the introduction of the Screening Certificate of Merit into the litigation process. The essence of this change was that a medical malpractice claimant could no longer file a complaint without first obtaining an affidavit from a health care provider which affirmed that a justifiable medical deviation had, in fact, occurred in a given case. It was the well-publicized hope of the Legislature that this change would eradicate frivolous suits and thereby change the landscape of medical malpractice litigation in West Virginia. However, the cap for non-economic damages under MPLA II remained unchanged from the one million dollar ($1,000,000,00) level provided for under the

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

MPLA I. This factor allowed potential recovery for non-economic damages to remain unreasonably high despite the enactment of the new Certificate of Merit provisions into the litigation process. Accordingly, the number of malpractice suits filed did not noticeably subside.

In addition, at the same time the MPLA II was enacted, the malpractice problem in West Virginia intensified. The costs of coverage not only continued to climb, but also the availability of coverage became an acute issue for physicians all across West Virginia. As the 2003 legislative session began, many providers had already left the state, and those that remained actively lobbied the Legislature for meaningful reforms beyond those created by the MPLA II. The result was the enactment of House Bill 2122, which became known as th MPLA III. This most recent statutory change became effective in West Virginia on July 1, 2003, and its impact on the volume of malpractice litigation has been significant.

When considering the rational basis of the accrual date, it is not difficult to quickly identify the practical issues created for the administration of cases when the date the cause of action arose triggers the amended statute. In the case of minors in West Virginia, a ten year window for the filing of medical malpractice actions exists. It is clear that using a prospective statute would have extended well into the foreseeable future the policy of allowing parties not responsible for the conduct at issue to be sued alongside actual tortfeasors. Such a result would have sent a chilling message to the physician community and their supporters who were lobbying hard in 2003 for medical malpractice tort reform. With doctors actually leaving the state, or threatening to do so, in large numbers at the

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time this legislation was pending and debated, it may well have sent a wrong message to continue to hold these lawsuits open for filing for a potentially long period following the enactment date. This outcome would have been particularly adverse to those physicians who treat children. The Legislature, therefore, had a rational basis for designating which version of the MPLA applied when the case at issue was filed after July 1, 2003. With the immediate implementation of the tort reform as the goal, the issue of retroactivity took a distinct back seat.

The next argument which Appellant's constitutional position triggers is whether or not her cause of action is protected by the Certain Remedy Clause of the West Virginia Constitution. West Virginia Constitution, Article III, Section 17. "The term 'vested right', as used in the certain remedy provision, means an actual cause of action which was substantially affected existed at the time of the legislative enactment". Gibson at 225, 451. Though this Court has not specifically and expressly held that a cause of action is a vested property right, it has quoted, seemingly with approval, that "[t]he United States Supreme Court has acknowledged that an accrued cause of action is a vested property right and is protected by the guarantee of due process". Id. Nevertheless, "when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 is implicated". Id.

The West Virginia Court has developed a two-part test for determining whether the Certain Remedy Clause is violated by the Legislature:

> When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting

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ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

> court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of Wet Virginia, the legislation will be upheld under that provision if, **first**, a reasonably effective alternative remedy is provided by the legislation *or, second*, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose. [Emphasis added]

Syl. pt. 5, Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 408 S.E.2d 634 (1991).

"Under the Lewis test, a statute which deprives a person of a previously recognized remedy for an injury will be sustained if the intent of the statute is to eliminate an economic problem, and repeal of the existing remedy is a reasonable method of achieving that purpose. Our prior decisions support finding that W.Va. Code §23-4-1f was enacted to address an economic problem facing the workers' compensation system, and that its enactment was a reasonable method of obtaining that purpose". State ex rel. Beirne v. Smith, 214 W.Va. 771, 591 S.E.2d 329 (2003).

Applying the two-prong Lewis analysis to the Cartwright case, the Court must consider whether or not, first, the statute at issue provides a reasonably effective alternative remedy for the right which was allegedly extinguished. Section 55-7B-9(g) of the West Virginia Code does not apply in situations where the physician whose care is at issue does not carry a minimum insurance coverage in the amount of one million dollars ($1,000,000.00). W.Va. Code §55-7B-9(g). This remedy provides the appellant assurance that she would have a right of redress for alleged injuries.

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Further, although the legislation at issue may have impaired what is arguably a vested right, the legislation must be upheld because a reasonably effective alternative remedy is provided therein. Lewis at Syl. pt. 5. The law of ostensible agency in West Virginia evolved to give a right of redress to persons treated in hospitals when the actual tortfeasors were not adequately insured. Had Dr. McComas not held the requisite insurance coverage, the right to sue the hospital under a theory of ostensible agency would have been available to her.

In the event that the remedy provideed is not considered by the Court to be reasonably effective, the Court must then consider whether or not the legislation is a reasonable method to eliminate a clear social or economic problem. Clearly the legislative history codified at West Virginia Code §55-7B-1 gives a laundry list of social and economic reasons for the statutory enactment *in toto*.

C. THE LEGISLATURE INTENDED W.VA. CODE §55-7B-9(G) TO EXTINGUISH THE ACCRUED CAUSE OF ACTION IN THIS CASE.

When statutory amendments become law after a cause of action has accrued, the threshold question for statutory interpretation is whether or not the Legislature intends the new amendments to apply retroactively. Public Citizen, Inc. v. First National Bank in Fairmont, 198 W.Va. 329, 280 S.E.2d 538 (1996). "A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or necessarily implied from the language of the statute." Syl. pt. 3, Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 270 S.E.2d 178 (1980).

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In the instant case, the trial court applied the 2003 amendments to the MPLA III. The specific amendment at issue was the MPLA III's change of the ostensible agency doctrine found in West Virginia Code §55-7B-9(g). The substantive change contained in the amendment does not abolish the ostensible agency doctrine in West Virginia medical malpractice cases, but does bar such claims when the alleged tortfeasor is a physician with a minimum of one million dollars ($1,000,000.00) of professional malpractice insurance coverage for the incident in question. It was undisputed below that, at the relevant times herein, Dr. McComas had the requisite insurance in place.

The Petition herein asserts that the trial court mistakenly applied W.Va. Code §55-7B-9(g) to a case which was filed after July 1, 2003, but arose October 9, 1999. However, the MPLA III states expressly and in pertinent part:

> The amendments to this article provided in Enrolled Committee Substitute for House bill No. 2122 [Acts 2003 c. 147] during the regular session of the Legislature, two thousand three, apply to all causes of action alleging medical professional liability which are **filed on or after the first day of July, two thousand three.** (emphasis added).

W.Va. Code, §55-7B-10(b).

It is clear from the plain language above, that the Legislature intended all medical professional liability cases filed after July 1, 2003, be subject to the amended law of the MPLA III, despite the date the cause of action arose. It is without question that the MPLA III was intended to apply retroactively to all cases filed after July 1, 2003, including the Complaint Appellant plaintiff filed in the action below against CHH in 2005.

The West Virginia Supreme Court has spoken on the issue of retroactivity as it relates to the 2003 amendments to the Medical Professional Liability Act in at least two

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401 10TH ST., SUITE 500
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cases. In its review of the Elmore v. Valley Hospital appeal, the West Virginia Supreme Court discussed retroactive application of the revised statute in footnotes two and six. In footnote two, the Court made note of the fact that the 2003 amendments to Article 7B of Chapter 55 apply to **all** medical professional liability cases filed on or after July 1, 2003. 220 W.Va. 154, 161, 640 S.E.2d 217, 161, n.2 (2006). (*emphasis added*). In that case, the plaintiff, Mr. Elmore, filed a second lawsuit to preserve his case within the statute of limitations while his first case was on appeal. Because the second case was filed after July 1, 2003, the Court reasoned that the case would be subject to the law as amended in 2003. Id. at 162, n.6.

The Court also addressed retroactive application of a medical professional liability statute to causes of action accrued before the statutory changes became law in the case of Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485 (2004). In Miller, the plaintiff filed her complaint against the defendants on June 9, 2003, and did not file a Certificate of Merit until June 20, 2003. Under the statutory provisions of the then current Medical Professional Liability Act (2002) (hereinafter "MPLA II"), the action could not commence until July 20, or thirty days after the Notice of Claim was completed by the filing of the Certificate of Merit. Because the plaintiff filed her case prior to the end of the thirty day waiting period, the defendants were granted summary judgment in the Circuit Court. The plaintiff appealed.

The W.Va. Supreme Court upheld the ruling below and focused primarily on the statutory prerequisites of filing under the MPLA II. Those issues are not germane to this case, but the Supreme Court's thoughtful analysis of the timing of the Complaint and the

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401 10TH ST., SUITE 500
HUNTINGTON, WV

examination of the Legislature's intent regarding retroactive application of the statute is on point with the case at bar. The Court also determined that the actual filing of the case occurred on July 20, 2003, which was after the effective date for the amendments to the W.Va. Code §55-7B-1 *et seq.* Therefore, the case was deemed to be governed by the new statute, regardless of the date when the cause of action had accrued.

In reaching its determination, the Court in Miller, looked closely at the meaning of the statute. (citing Syl. pt. 5, State v. General Daniel Morgan Post No. 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959), the Court took notice of the fact that "[w]hen a statute is clear and unambiguous and legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."

With respect to whether the MPLA II or the MPLA III applies to a particular cause of action, the West Virginia Legislature eliminated any guess work. The MPLA III applies to *all causes of actions* alleging medical professional liability which are *filed on or after July 1, 2003.* W.Va. Code §55-7B-10(1). Appellant herein filed her complaint against CHH in 2005. Therefore, with respect to her cause of action against CHH, MPLA III applies.

Elam v. Medical Assurance of West Virginia, 216 W.Va. 459, 607 S.E.2d 788 (2004) is another West Virginia Supreme Court decision which confirms the retroactive nature of the MPLA and its holding defeats plaintiff's arguments. The context of Elam is a medical malpractice cause of action involving an amended complaint. In Elam, the plaintiff filed her complaint on February 28, 2002. She amended her pleadings to include

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401 10TH ST., SUITE 500
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bad faith claims against the same defendant in an amended complaint filed on November 14, 2002. One of the central issues in Elam was whether or not the MPLA II, which the legislature made effective on March 1, 2002, was a bar to her bad faith claims. The Elam Court held that the MPLA II amendments were a bar to the bad faith claims and also specified that under West Virginia Rule of Civil Procedure 15(c) the bad faith claims set forth in the amended complaint could not relate back to the original complaint. Despite the plaintiff's contention that, because the medical professional liability action filed against the defendant health care provider occurred prior to the amended statute's effective date of March 1, 2002, and despite plaintiff's strenuous arguments that the provisions of the amendments did not apply, the Elam Court concluded that:

> . . . this Court discerns no basis for construing the statute in any other way than on the basis of its clear language. Indeed.... [a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.

Id. at p.463, 792.

In reaching this result the Elam Court cited Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 262 (1994); and Syl. pt. 4, Taylor-Hurley v. Mingo County Bd. of Educ., 209 W.Va. 780, 551 S.E.2d 702 (2001). According to Syl. pt. 3, in part, West Virginia Health Care Cost Review Auth. v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411 (1996), "if the language of an enactment is clear . . . courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery".

Another point to be made about the well settled principle that statutes in West Virginia are presumed constitutional is that the West Virginia Legislature, as a separate

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ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

but equal branch of government, is entitled to the presumption of constitutionality for its work product. That a statute is presumed constitutional in West Virginia is not a trite slogan: it is standard operating procedure as these two equal branches of government interact with each other. Therefore, with respect to challenging the constitutionality of a statute, the Court must first consider the following:

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W.Va Constitution Art. V, §1.] Every reasonable construction must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. pt. 1, Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 408 S.E.2d 351 (1991) Syl. pt. 1, (citing State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va.740, 143 S.E.2d 351) (1965).

Accordingly, the trial court herein, in its decision, was properly deferential to the presumption of statutory constitutionality when it ruled that applying the 2003 ostensible agency amendment to Appellant's post July 1, 2003 claim against CHH was appropriate based on the clear language of the statute, as amended.

Finally, it must be pointed out that Appellant either misreads or misunderstands the West Virginia Supreme Court's clear and decisive holding in Burless v. West Virginia University Hospital, 215 W.Va. 765, 601 S.E.2d 85 (2004). Burless is the definitive

ILES, CRAIG & YON, PLLC
ATTORNEYS at LAW
401 10TH ST., SUITE 500
HUNTINGTON, WV

authority in West Virginia regarding the apparent agency doctrine in the hospital/physician context. In Burless, the two causes of action under consideration were both filed before the enactment of the ostensible agency amendment. At footnote 13, the Burless court considers the amendment's applicability to causes of action filed before the statute's effective date. Since the ostensible agency amendment was enacted after the two causes of action were filed, the new statute was deemed to have no application in the Burless holding. Id. at FN 13. By implication, the holding in Burless stands for the conclusion that cases filed after the amendment's effective date are governed by the amended statute. The cause of action against the hospital in the proceeding below was filed, in fact, after the ostensible agency amendment at issue herein became effective. §55-7B-9(g) applies to Tiffany Cartwright's ostensible agency claim against CHH.

IV. CONCLUSION

The Circuit Court of Cabell County properly ruled on the Motion for Summary Judgment in the matter below based on the plain language of the West Virginia Code §55-7B-1, *et seq*. and, specifically, §55-7B-9(g).

WHEREFORE, Appellee respectfully requests that such ruling be upheld, and that this Honorable Court deny the Appeal herein.

Respectfully submitted,

CABELL HUNTINGTON HOSPITAL, INC.,

By _____
Of Counsel

BAILES, CRAIG & YON, PLLC
SUITE 500, THE ST. JAMES
401 TENTH STREET
HUNTINGTON, WEST VIRGINIA 25701
(304) 697-4700

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he/she served a true copy of the foregoing Brief of Appellee, Cabell Huntington Hospital, Inc., In Response to The Brief of Appellant, Jeanne Cartwright, upon counsel named below by depositing a true copy thereof in the United States Mail, postage prepaid at Huntington, West Virginia, on the 16th day of June, 2008, addressed as follows:

Charles M. Johnstone, II, Esquire
Mary K. Prim, Esquire
Thaxton & Johnstone, LLP
Post Office Box 313
Charleston, West Virginia 25321
Counsel for Plaintiffs

Anthony J. D'Amico, Esquire
Savinis, D'Amico & Kane, LLC
Gulf Tower, Suite 3626
707 Grant Street
Pittsburgh, Pennsylvania 15219
Counsel for Plaintiffs

Brian Alan Prim, Esquire
Prim Law Firm, PLLC
30 Chase Drive
Post Office Box 430
Hurricane, West Virginia 25526
Counsel for Plaintiffs

By _____
Of Counsel

Thomas L. Craig, Esquire (WV 859)
Rebecca C. Brown, Esquire (WV 7321)
BAILES, CRAIG & YON
Post Office Box 1926
Huntington, West Virginia 25720-1926
(304) 697-4700